STATE OF MICHIGAN

COURT OF APPEALS

EDWARD G. KABAROWSKI,

Plaintiff-Appellee,

v

MICHIGAN STATE POLICE,

Defendant-Appellant.

UNPUBLISHED
February 28, 2006

No. 257320
Livingston Circuit Court
LC No. 03-019972-CL

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiff, a fifty-three year old Caucasian State Trooper employed with defendant since 1978, brought suit alleging that defendant passed him over for four promotional opportunities because of his age, and a fifth because of both his age and race. The trial court dismissed the earliest of the age discrimination claims because the statute of limitations had run, but denied defendant's motion for summary disposition on the other four claims. Defendant appeals by leave granted. We reverse and remand for entry of summary disposition for defendant. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In September 2001, defendant posted an opening for the position of sergeant at the Brighton post. A thirty-five year old Caucasian male with eight years on the force won the promotion. The post commander at the time explained that the successful candidate's particular experience and less reserved character than plaintiff's rendered him one that other troopers would more readily seek out for guidance.

On February 22, 2002, defendant posted an opening for sergeant at the Owosso post. Plaintiff and three other candidates were eliminated because they failed to follow preliminary instructions. A thirty-five year old Caucasian male, who had been with the department for seven years, was selected to fill the position.

Another vacancy at the Brighton post for sergeant became available in early 2002. A sergeant from the Detroit post then came forward and received the transfer. Promotion procedures were consequently aborted. The transferring sergeant was younger than plaintiff and Hispanic. Plaintiff asserted that he was denied this promotion because of both his age and race, but admitted that he did not believe that defendant had an official policy of discriminating against whites, and acknowledged that all the promotions at issue were awarded to Caucasians.

In October 2003, there was another posting for a sergeant position at the Brighton post. A thirty-nine year old Caucasian male was selected to fill the position. The acting post commander explained that the decision followed from the successful candidate's higher interview and performance-appraisal scores, along with his background as instructor and leader.

The Civil Rights Act prohibits an employer from discriminating against an employee because of race or age. MCL 37.2202(1)(a). A plaintiff's prima facie case of discrimination requires that the employee prove that he or she "was (1) a member of a protected class, (2) subject to an adverse employment action, (3) qualified for the position, and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 695 (Brickley, J., joined by Boyle and Weaver, JJ.), 707-709 (Riley, J., concurring); 568 NW2d 64 (1997), citing *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).

Establishing the prima facie case creates a presumption that the employer's adverse action followed from illegally discriminatory motivation, which the employer may rebut by articulating some legitimate reason for the adverse action. When a plaintiff asserts that an employer's proffered reason for its action was pretextual, the plaintiff bears the burden of providing evidence to support that theory. *Lytle v Malady (On Rehearing)*, 458 Mich 153, 173 (Weaver, J., joined by Boyle and Taylor, JJ.), 186 (Mallet, C.J., concurring); 579 NW2d 906 (1998).

We review a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004).

Concerning age discrimination, plaintiff cites a spreadsheet covering all the promotions to sergeant in the department since 1999, but fails to detail how those listings support his case. We find within them neither an obvious preference for younger applicants nor an obvious disfavoring of older ones. Also not deserving of further inquiry is plaintiff's unsubstantiated statement that he "has produced direct evidence of age . . . discrimination in this case." A party may not leave it to the appellate court to "'unravel and elaborate for him his arguments . . . .'" *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Plaintiff's failure to rebut defendant's articulated nondiscriminatory reasons for promoting younger persons over him is fatal to his age discrimination claims.

The Civil Rights Act protects all persons from racial discrimination equally, with uniform burdens of proof, regardless of the race or races involved. *Lind v Battle Creek*, 470 Mich 230, 232-234; 681 NW2d 334 (2004). To present a jury-submissible question of racial discrimination, "a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle, supra* at 176. "[S]peculation or conjecture is insufficient to raise a genuine issue of material fact." *Stefan v White*, 76 Mich App 654, 661; 257 NW2d 206 (1977).

Plaintiff alleged racial discrimination in connection with only one promotional opportunity. Plaintiff admitted on deposition that he had no basis other than the racial dissimilarity between himself and the incumbent sergeant for asserting a racial animus. Plaintiff's assertion, then, is unsupported conjecture, which is not sufficient to sustain a claim of discrimination. *Stefan, supra*. "If . . . there are two or more equally plausible explanations arising out of the evidence, the selection of one would not be a reasonable inference but would rather be mere conjecture on the part of the trier of fact." *Buckeye Union Fire Ins Co v Detroit Edison Co*, 38 Mich App 325, 331-332; 196 NW2d 316 (1972). We conclude that defendant's explanation that it preferred to effect the lateral transfer of an incumbent sergeant over continuing the promotion process is in fact more plausible than plaintiff's bald theory that he was passed over because he was "not a member of any protected class or minority."

We reverse and remand this case with instructions to the trial court to grant defendant's motion for summary disposition on plaintiff's remaining claims. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey